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10  
11 UNITED STATES DISTRICT COURT  
12  
13 NORTHERN DISTRICT OF CALIFORNIA  
14  
15 SAN FRANCISCO DIVISION

16 ETHAN ZUCKERMAN,  
17 Plaintiff,  
18 v.  
19 META PLATFORMS, INC.,  
20 Defendant.

21 Case No. 3:24-CV-02596-JSC

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**REQUEST FOR JUDICIAL NOTICE  
AND INCORPORATION BY  
REFERENCE IN SUPPORT OF  
MOTION OF DEFENDANT META  
PLATFORMS, INC. TO DISMISS  
AMENDED COMPLAINT**

**Hearing:**

Date: October 10, 2024  
Time: 10:00 a.m.  
Courtroom: 8, 19th Floor  
Judge: Hon. Jacqueline Scott Corley

1           **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2           **PLEASE TAKE NOTICE** that pursuant to Federal Rule of Evidence 201(b), Defendant Meta  
 3 Platforms, Inc. respectfully requests that the Court take judicial notice of Exhibits 1 to 6 to the  
 4 Declaration of Jacob T. Spencer in support of its concurrently filed Motion to Dismiss the Amended  
 5 Complaint.

6           **DISCUSSION**

7           When ruling on a motion to dismiss, courts may consider documents incorporated by reference  
 8 and matters subject to judicial notice without converting the motion into one for summary judgment.  
 9 *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). Documents incorporated by  
 10 reference include those that a complaint refers “extensively to” or that “[f]or[m] the basis of the  
 11 plaintiff’s claim,” *id.* at 1002 (quoting *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)), as  
 12 well as documents that the complaint “necessarily relies” on, the authenticity and relevance of which  
 13 are uncontested, *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). A court may take  
 14 judicial notice of matters that fall into any of three categories: (1) matters that are generally known  
 15 within the trial court’s territorial jurisdiction, (2) matters that are capable of accurate and ready  
 16 determination by resort to sources whose accuracy cannot reasonably be questioned, and (3) matters  
 17 that are not subject to reasonable dispute. *See Fed. R. Evid. 201(b).*<sup>1</sup>

18           Here, the Court should take judicial notice of two sets of documents: (I) Meta’s Terms of  
 19 Service (Exhibit 1); and (II) news articles and blog posts reflecting Plaintiff’s statements about this  
 20 declaratory judgment action (Exhibits 2 to 6).

21           **I. Meta’s Terms of Service (Exhibit 1)**

22           Meta requests that the Court consider Meta’s current Terms of Service because the Terms are  
 23 incorporated by reference into the Amended Complaint. A document is incorporated by reference  
 24 where it “forms the basis of the plaintiff’s claim” or where the plaintiff’s claims “necessarily depend

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 26           <sup>1</sup> These two exceptions apply not only to motions to dismiss under Rule 12(b)(6) (as in *Khoja*), but also  
 27 to motions brought under Rule 12(b)(1). *See Poorsina v. Xiaosong Zhang*, 2021 WL 1222520, at \*5  
 28 (N.D. Cal. Mar. 31, 2021) (when attacking subject matter jurisdiction under Rule 12(b)(1), “[a] court  
 may . . . consider . . . documents attached to the complaint [and] documents incorporated by reference  
 in the complaint . . . without converting the motion to dismiss into a motion for summary judgment”  
 (citing *Ritchie*, 342 F.3d at 907–08) (cleaned up)).

1 on” the document. *Khoja*, 899 F.3d at 1002.

2 Here, Count II of the Amended Complaint seeks a declaration regarding whether Unfollow  
 3 Everything 2.0 would violate Meta’s Terms, Am. Compl. at p. 32 ¶¶ 6–7, which Plaintiff refers to as  
 4 “the subject of this suit,” *id.* ¶ 10. Count III further seeks a declaration that Meta’s Terms are void for  
 5 public policy to the extent that they would prohibit operation of Unfollow Everything 2.0. *Id.* at 33–  
 6 34. Because Meta’s Terms form the basis of Plaintiff’s breach of contract and public policy claims,  
 7 they are incorporated by reference into the Amended Complaint and should be considered in ruling on  
 8 Meta’s motion to dismiss—as many other courts in this District have done in similar circumstances.  
 9 See, e.g., *Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024, 1037 n.1 (N.D. Cal. 2019) (incorporating by  
 10 reference Facebook’s Terms of Service where the “complaint relied on the Terms of Service at length  
 11 to allege its breach of contract claims and statutory claims”); *Lloyd v. Facebook, Inc.*, 2022 WL  
 12 4913347, at \*4 (N.D. Cal. Oct. 3, 2022) (same); *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d  
 13 797, 813–14 (N.D. Cal. 2020) (same).

14 The Terms (which are posted online) are also subject to judicial notice because they are “not  
 15 subject to reasonable dispute” and their “accuracy cannot reasonably be questioned.” *Khoja*, 899 F.3d  
 16 at 999 (quoting Fed. R. Evid. 201(b)(1)–(2)). Because the contractual terms “are publicly available,  
 17 standard documents that are capable of ready and accurate determination,” *Opperman v. Path*, 84 F.  
 18 Supp. 3d 962, 976 (N.D. Cal. 2015), courts routinely find that “[p]ublic terms of service and privacy  
 19 policies are proper subjects of judicial notice,” which is another basis to consider the Terms in ruling  
 20 on Meta’s motion to dismiss, *In re Zoom Video Commc’ns Inc. Priv. Litig.*, 525 F. Supp. 3d 1017, 1026  
 21 n.2 (N.D. Cal. Mar. 11, 2021) (judicially noticing online terms of service).

## 22 **II. Plaintiff’s Statements About This Lawsuit (Exhibits 2 to 6)**

23 Meta also requests that the Court consider publicly available online news articles and blog posts  
 24 containing statements by Plaintiff about his declaratory judgment action, which are relevant to this  
 25 Court’s consideration of Meta’s request for dismissal pursuant to Rule 12(b)(1):

- 26 • **Ex. 2:** Blog post titled “*Zuckerman v. Meta Platforms*” as published or made publicly available  
 27 on the Ethan Zuckerman blog on May 2, 2024, and available at  
<https://ethanzuckerman.com/2024/05/02/zuckerman-vs-meta-platforms/>.

- 1     • **Ex. 3:** News article titled “I Love Facebook. That’s Why I’m Suing Meta.” by Ethan Zuckerman  
2       as published or made publicly available on The New York Times website on May 5, 2024 and  
3       available at <https://www.nytimes.com/2024/05/05/opinion/facebook-court-internet-meta.html>.
- 4     • **Ex. 4:** News article titled “Professor sues Meta to allow release of feed-killing tool for  
5       Facebook” by Ashley Belanger as published or made publicly available on the Ars Technica  
6       website on May 9, 2024 and available at <https://arstechnica.com/tech-policy/2024/05/professor-sues-meta-to-allow-release-of-feed-killing-tool-for-facebook/>.
- 7     • **Ex. 5:** News article titled “A professor is suing Facebook over its recommendation algorithms”  
8       by Mathew Ingram as published or made publicly available on the Columbia Journalism  
9       Review website on May 16, 2024 and available at [https://www.cjr.org/the\\_media\\_today/meta-facebook-lawsuit-algorithms-ethan-zuckerman.php](https://www.cjr.org/the_media_today/meta-facebook-lawsuit-algorithms-ethan-zuckerman.php).
- 10    • **Ex. 6:** News article titled “Why I’m suing Facebook in US federal court” by Ethan Zuckerman  
11      as published or made publicly available on the Prospect Magazine website on May 7, 2024 and  
12      available at <https://www.prospectmagazine.co.uk/ideas/technology/66018/why-im-suing-facebook-in-us-federal-court>.

11           “Courts may take judicial notice of publications introduced to ‘indicate what was in the public  
12       realm at the time.’” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th  
13       Cir. 2010); *see also Diaz v. Intuit, Inc.*, 2018 WL 2215790, at \*3 (N.D. Cal. May 15, 2018) (“Publically  
14       accessible websites and news articles are proper subjects of judicial notice.”); *Tarantino v. Gawker  
15       Media, LLC*, 2014 WL 2434647, at \*1 n.1 (C.D. Cal. Apr. 22, 2014) (“Courts have found website and  
16       newspaper articles to be proper subject for judicial notice when those materials . . . concern facts at  
17       issue in the complaint.”). The Court may take judicial notice of the fact of Plaintiff’s public statements  
18       concerning his intent in filing this suit and the immediacy of the harms he alleges. *See In re Google  
19       Assistant Priv. Litig.*, 457 F. Supp. 3d at 813 (taking judicial notice of blog posts “for the fact that  
20       Google made the statements it contains”).

21           Judicial notice is proper where the “publications meet the standards for admissibility,” *Von  
22       Saher*, 592 F.3d at 960, *i.e.*, that the articles and blog posts are “not subject to reasonable dispute”  
23       because they are either “generally known” or “can be accurately and readily determined from sources  
24       whose accuracy cannot reasonably be questioned,” Fed. R. Evid. 201(b)(1)–(2). Exhibit 2 is a blog  
25       post that Plaintiff published on his own blog, and Exhibits 3 to 6 are news articles on major media  
26       outlets. These are “publicly available documents, available on publicly accessible websites, they are  
27       capable of accurate and ready determination from sources whose accuracy cannot reasonably be  
28       questioned,” and they are thus properly subject to judicial notice. *In re Facebook, Inc. Sec. Litig.*, 477

1 F. Supp. 3d 980, 1009 (N.D. Cal. 2020), *aff'd in part, rev'd in part and remanded*, 87 F.4th 934 (9th  
2 Cir. 2023) (taking judicial notice of news articles); *see also Ho v. Marathon Patent Grp., Inc.*, 2022  
3 WL 1600048, at \*7 (C.D. Cal. Feb. 11, 2022) (taking judicial notice of news articles that contained  
4 sufficient indicia of authenticity, including “distinctive website designs, publication dates, page  
5 numbers, and web addresses”).

6 **CONCLUSION**

7 For the foregoing reasons, Meta respectfully requests that the Court consider Exhibits 1 to 6 of  
8 the concurrently filed Declaration of Jacob T. Spencer in its adjudication of Meta’s Motion to Dismiss.  
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10 Dated: July 15, 2024

GIBSON, DUNN & CRUTCHER LLP

11 By: /s/ Kristin A. Linsley  
12 Kristin A. Linsley

13 *Attorneys for Defendant Meta Platforms, Inc.*